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8 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

9 **-oOo-**

10 UNITED STATES OF AMERICA,

2:16-cr-00100-GMN-PAL

11 Plaintiff,

12 vs.
13 **RESPONSE TO DEFENDANT'S**
MOTION IN LIMINE REGARDING
DRUG USE (ECF No. 56)

14 JAN ROUVEN FUECHTENER,

15 Defendant.
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18 The United States of America, through the undersigned, respectfully responds to
19 the Defendant's Motion in Limine to "to disallow the government from mentioning
20 drugs or drug usage in the instant case." ECF No. 56. For the reasons set forth below,
21 the Government respectfully requests that this Honorable Court deny the motion.

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1 STATEMENT OF RELEVANT FACTS

2 A. PROCEDURAL FACTS

3 On March 30, 2016, a federal Grand Jury sitting in Las Vegas, Nevada, issued
4 an indictment against the defendant, Jan Rouven Fuechtener, charging him with one
5 count of Possession of Child Pornography, in violation of Title 18, United States Code,
6 Section 2252A(a)(5)(B); one count of Receipt of Child Pornography, in violation of Title
7 18, United States Code, Section 2252A(a)(2) and (b); one count of Receipt of Child
8 Pornography, in violation of Title 18, United States Code, Section 2252A(a)(2) and (b);
9 and one count of Advertising of Child Pornography, in violation of Title 18, United
10 States Code, Section 2251(d)(1)(A). The indictment also contains forfeiture allegations
11 pertaining to the child pornography allegations.

12 B. SUBSTANTIVE FACTS

13 In August 2015, a Task Force Officer (TFO) from the FBI Buffalo Field Office
14 Child Exploitation Task Force (CETF), operating in an undercover capacity, was
15 accepted into the network of an individual utilizing the user name “Lars45” on the
16 GigaTribe peer-to-peer (P2P) file-sharing network.

17 GigaTribe is a publicly available peer-to-peer (P2P) file sharing program that
18 allows one person to share his or her computer files with another person over the
19 internet. The shared files can contain video, audio, or image files. Unlike other
20 programs like Dropbox, GigaTribe does not host the files, but rather the files remain on
21 the user’s own computer. Thus, each computer in the network stores its own files and
22 runs its own applications. One benefit of the software is that it allows users to invite
23 other people, i.e. “friends” in their “tribe,” to view and download from specific password
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1 protected folders. GigaTribe has become a favored method for sharing illegal materials
2 such as child pornography because it limits who can download from the user by
3 requiring actual contact between users to obtain the password for each folder. This
4 actual contact can be happen within the GigaTribe chat function or on other platforms,
5 such as Skype or Grindr. GigaTribe is also preferred because it allows likeminded
6 friends to obtain passwords to the folders, and view files before deciding to download
7 the files.

8 The Lars 45 tribe that the TFO joined was known for exchanging child
9 pornography. On August 4, 2015, through a chat message within the GigaTribe P2P
10 file sharing program and within the child pornography interest network, Lars45
11 initiated contact with the TFO and provided the password to his locked shared folders
12 on GigaTribe. The TFO was able to browse Lars45's shared directories and observed
13 thumbnail previews of many images/videos of child pornography, as well as file titles
14 indicative of child pornography.

15 On September 14, 2015, the TFO signed on to GigaTribe and observed that
16 Lars45 was again logged into the network. Using the password previously supplied by
17 Lars45, the TFO successfully downloaded numerous files of child pornography from the
18 password protected folders Lars45 was sharing. The files of child pornography were
19 from one IP address. In this case, the IP address that provided the password to the
20 child pornography files was determined to originate from 7080 Donald Nelson Avenue,
21 Las Vegas, Nevada ("the Residence"). Subpoenas sent to GigaTribe revealed that the
22 account had an email address of larsschmidt22@hotmail.com.

23 On January 21, 2016, FBI Special Agent Mari Panovich executed a Federal
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1 search warrant at the Residence. U.S. Magistrate Judge Nancy J. Koppe issued the
2 search warrant after a probable cause determination regarding an ongoing distribution
3 and possession of child pornography investigation. Upon execution of the
4 aforementioned search warrant, law enforcement made contact with Fuechtener at the
5 subject residence, which is owned by Fuechtener and Frank Dietmar Alfter, the
6 Defendant's husband.

7 The defendant admitted post-*Miranda* to Special Agent Panovich that
8 larsschmidt22@hotmail.com was his email address, and that he downloads from
9 GigaTribe with the user name "Lars45."

10 The agents seized 38 devices, and numerous alarm clock cameras located
11 throughout the Residence. Trained experts conducted forensic examination of the
12 devices found throughout the Residence, and discovered that devices found in virtually
13 every area of the house revealed child pornography videos and images. Additionally,
14 forensic examination of the devices revealed thousands of pages of chats between the
15 defendant and others on both Skype and Grindr social media platforms.

16 Fuechtener was later indicted by the Federal Grand Jury on the above
17 mentioned charges. At his arraignment, he pled not guilty. ECF No. 16.

18 **ARGUMENT**

19 At issue in this Motion are four items relating to drug use: (1) social networking
20 communications, (2) a photo of a glass pipe from the date of the search warrant
21 execution, (3) footage from the alarm clock cameras that show illegal drug use, and (4)
22 a phone text message chain referencing drugs. The Government will not be seeking to
23 introduce the last three, as the Government agrees with the defense that drug use, in
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1 isolation, is irrelevant to the child pornography investigation in this case.

2 The Government will be seeking to introduce several of the social networking
 3 communications from Grindr, which are entirely relevant, inextricably intertwined
 4 with the child pornography charges, and not unduly prejudicial to a degree that cannot
 5 be cured with a limiting jury instruction. Only one of these communications references
 6 drugs possession/use.

7 That chat relates to drugging a child. *See Exhibit 1.* This exchange between the
 8 the defendant and another unknown person occurred on the Grindr social media
 9 application and was extracted from one of the many devices collected during the search
 10 warrant. *Id.* The specific chat conversation proceeds with the defendant¹ and an
 11 unknown person coordinating to watch “yng”/ “young”/ “young brothers”/ “young porn”/
 12 “Perv porn” on a laptop in a hotel room in Las Vegas. *Id.* The discussion then turns to
 13 the unknown person admitting that he had previously molested young boys he babysat.
 14 The defendant then asks the unknown person “Hot wow you think we can pull
 15 something off together?” meaning that the two could molest young boys. The next day
 16 during another conversation with the same unknown person, the defendant asks the
 17 unknown person if they “can pull something,” in reference to what they “talked about
 18 yesterday.” *Id.* Then, the defendant asks the unknown person “shall we drug a young,”
 19 to which the unknown person responds “Fuck yes” and the defendant states that he
 20 “will bring the favors” and the unknown person would “bring the candy.” *Id.*

21 As a preliminary matter, this chat does not explicitly note the defendant’s drug
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23 ¹ Grindr profile 54111653 was used by the defendant.

1 use. The chat only references drug use by the term “favors,” which Sergeant Carry will
2 testify is a coded reference to drugs. The defense objects on the basis that defense
3 counsel and “Mr. Smith (defense’s noticed expert are unaware of any empirical
4 evidence or studies that back up the government’s assertion that there is some sort of
5 nexus between child pornography and drug usage.” ECF No. 56. The Government is
6 not surprised that Mr. Smith is unaware of any empirical evidence as there is simply
7 no indication in his CV that would demonstrate knowledge of this particular subject
8 matter. But, in any event, that is not the Government’s position. To be sure, Sergeant
9 Carry *is not* being called to testify about *correlation between child pornography and*
10 *drug usage*. As stated in the Government’s notice, Sergeant Carry is being called to
11 testify about “*language used by offenders* in communicating about child exploitation
12 and corresponding drug use.” ECF No. 51, 2 (emphasis added). Indeed, the
13 Government’s notice further clarifies that “[i]n the Ninth Circuit, “[d]rug jargon is well
14 established as an appropriate subject for expert testimony [under Rule 702]. . . .
15 Officers may testify about their interpretations of ‘commonly used drug jargon’ based
16 solely on their training and experience.” *United States v. Vera*, 770 F.3d 1232, 1241
17 (9th Cir. 2014) (citations omitted).

18 On the substantive merits, introduction of this specific Grindr chat is relevant
19 because it relates to interest in child pornography and sex with young children, which
20 in turn is directly relevant to the possession and advertising of child pornography
21 charges. The coded reference to drug use is relevant and necessary to give the jury
22 context. Without this exceptionally limited reference, the jury will be left unable to
23 determine what “favor” means as opposed to “candy,” where one refers to a live human
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1 child or child pornography for viewing, and the other refers to the drugs. It is not the
2 Government's intention to focus on or even to draw unnecessary attention to any drug
3 usage, but merely to give jurors some context of the relevant behavior in this case. In
4 fact, to exclude this evidence will leave jurors even more confused than simply and
5 quickly explaining what the coded reference means.

6 While the Government recognizes that the passing mention of drug usage could
7 have a limited prejudicial effect, that effect is not so prejudicial that it outweighs the
8 exceptionally high probative value of the evidence. Fed. R. Evid. 403. Contrary to the
9 defense's position that "it would be difficult to undue [sic] the harm" caused by
10 Sargeant Carry's testimony, any minor prejudicial effect can be readily cured with a
11 limiting jury instruction. Indeed, Ninth Circuit Model Jury Instruction 4.3 was
12 designed specifically for this purpose. It instructs jurors that they "heard evidence
13 that the defendant committed other acts not charged," and that the jurors could only
14 consider that evidence "on the question of the defendant's intent, motive, opportunity,
15 preparation, plan, knowledge, identity, absence of mistake, or absence of accident and
16 for no other purpose," including as "evidence of guilt." See Ninth Circuit Model Jury
17 Instruction 4.3 (2010). Once given this instruction, the law has long-presumed that
18 jurors follow the instruction given. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); see
19 also *United States v. Plancarte-Alvarez*, 366 F.3d 1058 (9th Cir. 2004) (The disputed
20 evidence had significant probative value while the danger of unfair prejudice was
21 minimized by the court's limiting instruction) (citing *United States v. Basinger*, 60 F.3d
22 1400, 1408 (9th Cir. 1995)). Ninth Circuit Model Jury Instruction 4.3 is sufficient to
23 remediate any minimal prejudicial effect caused by a single passing reference to drug
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1 possession.

2 **CONCLUSION**

3 As the Grindr chat described above is entirely relevant, inextricably intertwined
4 with the child pornography charges, and not unduly prejudicial to a degree that cannot
5 be cured with a limiting jury instruction, the Government respectfully requests that
6 this Honorable Court deny the motion.

7 DATED this 14th day of July, 2016.

8 DANIEL G. BOGDEN
9 United States Attorney

10 //s//

11 CRISTINA D. SILVA
12 ELHAM ROOHANI
13 Assistant United States Attorneys

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